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Supreme Court of the United States

OCTOBER TERM, 1948

No. 232

ALLEN T. SIMMONS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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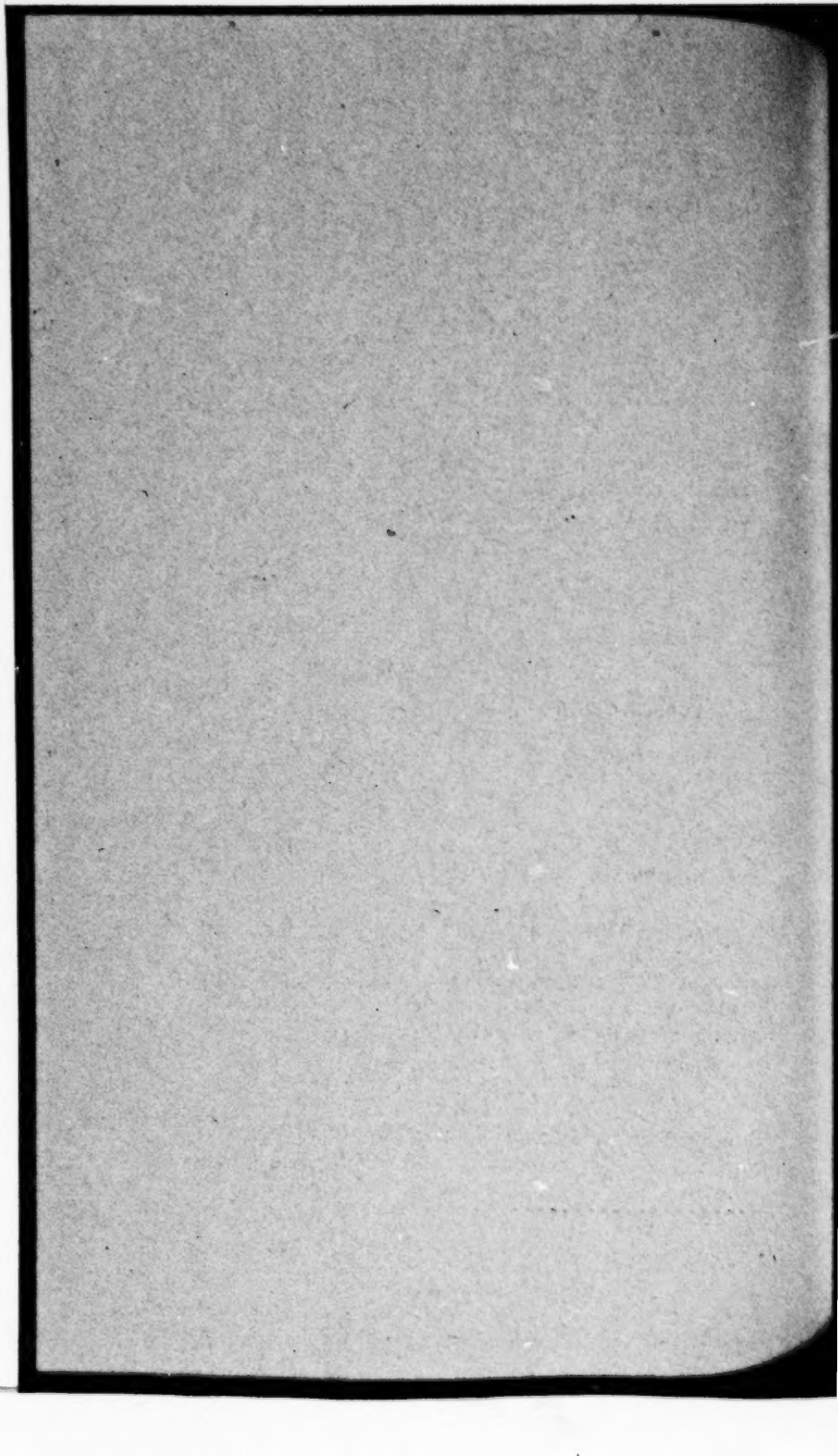

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a writ of certiorari to review a decision and order of the United States Court of Appeals for the District of Columbia of May 24, 1948 (by a panel

of three judges), dismissing an appeal from a decision of the Federal Communications Commission denying the petitioner's application for a permit to improve the facilities of his radiobroadcasting station, and granting a conflicting and mutually-exclusive such application of another.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 23, 1925, and Section 402(e) of the Communications Act of 1934.

C.

QUESTIONS PRESENTED.

1. Under the First Amendment to the Constitution and under Section 326 of the Communications Act of 1934 (prohibiting censorship), may the Federal Communications Commission deny an application for a radiobroadcasting license on the sole ground that the applicant intends that substantially all his programs during the most-desirable hours of the day shall be of network origin, the high quality of such programs being conceded?

2. May the Federal Communications Commission, after having given the parties notice of a general hearing to compare all aspects of two mutually-exclusive applications for the same radiobroadcasting facility (as required by the decision of this Court in *Ashbacker Radio Corporation* vs. *Federal Communications Commission*, 326 U. S. 327), then convert the hearing into separate *ex parte* proceedings through a decision which denies one upon the basis of its expected program structure and grants the other upon a non-comparative basis?

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION AND THE COURT BELOW.

The petitioner is licensee of radiobroadcasting station WADC at Akron, Ohio. The other party to the proceeding before the Federal Communications Commission was WGAR Broadcasting Company, licensee of WGAR at Cleveland. The petitioner has been assigned the frequency 1350 kc., WGAR, 1220 kc. At the outset of the present proceedings, each party was permitted to use five thousand watts power. It had then become apparent that the frequency 1220 kc. would permit the use of fifty thousand watts power, whereas 1350 kc. was a frequency at which five thousand watts would remain the maximum. By the applications before the Commission:

1) WGAR requested permission to increase its power to fifty thousand watts, and

2) The petitioner requested an exchange of frequencies with WGAR so as to assign the latter 1350 kc. with five thousand watts while his own station, WADC, would operate at 1220 kc. with fifty thousand watts (R., p. 122).

Either frequency with five thousand watts at the Cleveland location would provide adequate service to Cleveland; the change in frequency of WGAR from 1220 kc. to 1350 kc., as proposed by the petitioner, would not measurably reduce its coverage. The only relevant difference between the frequencies was in the matter of permitting the higher power (R., pp. 125-126). The applicant receiving the fifty-thousand-watt authorization would have a much more extended coverage, including large rural areas surrounding Cleveland (R., p. 125).

Upon consideration of the two applications, the Federal Communications Commission on February 1, 1946, desig-

nated both of them for joint and comparative hearing (R., pp. 11-14). On February 18, it served upon both parties formal notices of the issues upon which the alleged comparative hearing was to be held. In the instance of the petitioner, the Commission proposed to determine his qualifications, the expected coverage, the type and character of program service as regards its suitability to meet the requirements of the area to be served, whether or not there would be interference, the suitability of the equipment, the requirements of the Civil Aeronautics Administration, and "to determine on a comparative basis which, if either, of the applications in this consolidated proceeding should be granted". The issues specified for the WGAR application were substantially similar (R., pp. 11-14).

Shortly after the publication of the notices of hearing and on March 7, 1946, the Commission, without regard to any pending application and in connection with no hearing, published a document entitled "Public Service Responsibility of Broadcast Licensees" (U. S. Government Printing Office).

This is an intensive and long discussion of the Commission's concern with the program service of the radiobroadcasting stations of the United States, and a detailed evaluation of some of the trends in taste, content and classification of the programs of many stations.

More importantly the Commission's publication announced the policies which the Commission would enforce in the granting of licenses and renewals of licenses. It specifically published the Commission's standards of programming with regard to requirements for the carrying of sustaining programs, requirements for the carrying of local live programs, requirements for the discussion of public issues, and prohibition of advertising excesses. The report also published the procedural methods by which the Commission in future would insure compliance with its requirements in the four aspects indicated.

After the publication of this report, the petitioner on April 7th filed an amendment to his pending application by which he substituted for the program description (which is required by the Commission for such applications), a new one. The substituted program description recited "applicant proposes to operate as Columbia outlet for Akron and Cleveland, providing complete service of Columbia commercial and sustaining programs, plus augmented programs of local origin, to serve the proposed coverage area" (R., pp. 24-25).

April 12th, the petitioner filed a supplemental amendment showing percentage-wise the breakdown of the various program classifications (R., pp. 25-26).

A full competitive and comparative hearing (so far as the examiner was concerned) was held before an examiner of the Commission April 24th to 26th, inclusive. At that time, all aspects of engineering, of qualifications, of interference, of management, and many other details were extensively canvassed. The hearing transcript consisted of 504 typewritten pages; 91 exhibits were offered and received in evidence.

The Commission's proposed decision was handed down October 8, 1946. While it contained a discussion of the evidence, it proposed to deny the petitioner's application on one feature alone. It pointed out that on a comparative basis, there were two factors tending to favor a grant of the petitioner's application. The first of these was the local residence of the petitioner as against the non-residence of the controlling interests of WGAR. The second was the overlapping of service areas of WGAR and of WJR, located at Detroit, and which is under common control with WGAR. After discussing these considerations the Commission stated that it felt that these advantages on behalf of the petitioner were outweighed by a disadvantage, namely, that WDAC "proposes merely to become a conduit for the network programs of the Columbia Broadcasting System for the entire day after 8:00 a. m." (R., pp. 82-102).

To this proposed decision the petitioner filed his exceptions on October 28, 1946. The principal exception was "to any consideration by the Commission of the nature, character or content of the present or proposed programs of either applicant." Exception was also taken to the censorship implied and to the failure of the Commission to consider all available program service to the Cleveland area as a unity, arguing that the public was served through a number of different programs at any one time, rather than by confining the listener to the service from one individual station. These exceptions were accompanied by a brief (R., pp. 102-115).

Oral argument was held November 20, 1946. The Commission's final decision was handed down April 27th, 1947 (R., pp. 120-146).

In the final decision, the Commission departed from the comparative consideration of the two applications which had been given in the proposed decision, although a number of the findings of fact were carried over. The findings of fact, however were merely set up mechanically and were not in general relied upon for the Commission's conclusions and order. The final paragraph of the order says that if, for any reason, the Commission can deny the application of the petitioner, "no comparative consideration of the relative merits of the two conflicting and mutually-exclusive applications is required." The comparative consideration was refused the petitioner upon one ground only, namely, that "if this application for an increase in power is granted, it [WADC], intends to inaugurate a new program policy and . . . under this program policy, it will carry all the commercial and sustaining programs, without exception, offered by the network during the broadcast day."

Having thus disqualified the petitioner's application from consideration, the Commission held that "no comparative consideration of the relative merits of the two conflicting and mutually-exclusive applications is required" and

granted the application of WGAR Broadcasting Company on an *ex parte* basis (R., p. 145).

There was an unsuccessful petition for rehearing (R., pp. 146-160).

An appeal was taken to the United States Court of Appeals for the District of Columbia on July 21, 1947 (R., pp. 2-6). The petitioner's principal contention was that an out-of-hand denial of his application upon a prior textual evaluation of his proposed program content amounted to censorship, in violation of Section 326 of the Communications Act of 1934 (reprinted in the Appendix). He also contended that he had been deprived of the comparative hearing to which he was entitled and which had been provided for by the Commission's original notices of hearing.

The appeal was taken both under Section 402(b)(1) of the Act from the denial of the petitioner's application and under Section 402(b)(2) from the grant of the application of WGAR Broadcasting Company. (Both sections are reprinted in the Appendix.)

The case was argued before a panel of three, Justices Edgerton, Clark and Miller. The opinion of the Court has not yet been officially reported (R., pp. 162-165).

The majority of the Court, through Justice Edgerton held that the action of the Commission in refusing to consider the petitioner's application did not constitute censorship, on the authority of *National Broadcasting Company* v. *United States*, 319 U. S. 190.

To distinguish the Commission's action from censorship as the Court understood it, the Court quoted with approval the reasoning of the Commission as set forth in the latter's opinion:

> The application of WADC thus raises squarely the issue of whether the public interest, convenience and necessity would be served by a station which during by far the largest and most important part of the broadcast day "plugs" into the network line and, thereafter, acts as a mere relay station of program

material piped in from outside the community. We are of the opinion that such a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee. We do not mean to indicate that the daily program service of the Columbia Broadcasting System or any other network does not include many programs of a high calibre, and it may even be that the applicant's proposed policy of carrying all Columbia programs, commercial or sustaining, might result in making available to its listening audience for the first time certain valuable programs of a sustaining nature, or concerning some vital public issue, which would otherwise be eliminated in favor of some local commercial program. But applicant's proposed program policy is not only tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, but is an abdication to an organization which makes no pretense to scheduling its programs with the particular needs and desires of any one service area in mind. A national network affiliation can be of great assistance to a particular station's service to its listeners as the source of a quantity of high calibre programs of general interest not otherwise available locally, to supplement, rather than to supersede, the locally originated programs of the station. It is not equipped, however, to take over the entire programming of any station; even the stations which are wholly owned by the national networks maintain extensive local program staffs which integrate the network's service into a daily program best calculated to serve local interests. And the same considerations of public policy which led us, in our Chain Broadcast Regulations, upheld by the Supreme Court in National Broadcasting Company *v.* United States, 319 U. S. 190, to make it impossible for a network to restrict the opportunity of one of its affiliates to substitute programs of local interest and derivation whenever the

station determined that such programs would best serve the interests of its particular audience, lead us to conclude, here, that the voluntary adoption of a similar policy by a licensee cannot serve the public interest. In either case the local interests of the listening community are needlessly sacrificed . . . (R., p. 163).

Mr. Justice Miller filed a separate opinion denominated "concurring". He "concurred" because he felt the petitioner's application should have been denied upon the ground that the petitioner was requesting a frequency already in use. This appears to be a misapprehension of the theory on which the cases were before the Commission, inasmuch as all parties were in agreement that the Commission, on the pleadings, could lawfully require WGAR to change frequency from 1220 kc. to 1350 kc. without loss of coverage. Otherwise, the opinion of Justice Miller is in effect a dissenting one. It was his view that what was done by the Commission amounted to censorship as prohibited by the Act. He said:

> Instead of rejecting Simmons' application upon that obvious ground, the Commission chose to do so because Simmons had said he proposed, if the license were granted to him to use almost exclusively the programs of the Columbia Broadcasting System. This would not be in the public interest, the Commission said, and would amount to an abdication of the prospective licensee's right and power to select the programs for his broadcasts. I consider it, on the contrary, to be an exercise of the right of choice.
>
> Simmons had not bound himself by contract with Columbia to use its programs as extensively as he said he proposed to do. Nothing would prevent him from interrupting that use at will, and interjecting programs of local origin and interest whenever he saw fit, unless the Commission itself should require him to adhere completely to his expressed intention.
>
> Denial of a license because the applicant expects to make large use of the facilities of one of the major

broadcasting companies of the country, saying that such use will not be in the public interest, seems an arbitrary and capricious exercise of power not granted by statute, but expressly forbidden by it. It is not a finding based on evidence. Nor is it justified by the claim that in the public interest the Commission may require a balance between national and local material to be maintained by *every* station. The demands of his listeners, of which a licensee is keenly aware, will require that balance. The idea is especially untenable and groundless when, as in this case, the proposed station is in a metropolitan area already served by some fifteen other stations which devote time to the broadcasting of programs which have only a local interest.

To uphold the Commission's order because the applicant expressed an intention to make extensive use of Columbia's programs is to grant to the Commission the power of censorship, which is expressly forbidden by the Act. "Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred." (*Hannegan, Postmaster General* v. *Esquire, Inc.*, 327 U. S. 146, 151 (1946). Certainly the power of censorship should not be granted by a court when it has been withheld by the Congress. (R., pp.164-165).

E.

REASONS FOR GRANTING THE WRIT.

1) The Court below approved an act of censorship by the Commission, in violation of Section 326 of the Communications Act of 1934.

The important feature of the action of the Commission was that the Commission denied the petitioner's application on an absolute, not on a comparative basis. The application would have been denied if it were the only application pending. It was denied because of the prediction of the petitioner that his proposed programs would contain the full available schedule of the Columbia Broadcasting System. The Commission finds as a fact that the programs

are "good" programs (R., pp. 138-139), thus excluding any adverse view of the petitioner's program-making characteristics such as was the basis for the decisions in *KFKB Broadcasting Company* v. *Federal Radio Commission,* 60 App. D. C. 79 and *Trinity Methodist Church, South* v. *Federal Radio Commission,* 61 App. D. C. 311. The action of the Commission is a declaration that in this case and henceforth, regardless of all other considerations, technical, financial, of character or otherwise, the Commission will reject the application of any person who proposes to broadcast a full network schedule of programs.

This is censorship in the broadest form. It is a much-stronger instance of censorship than the advance elimination of phrases or texts. It is the proscription of a type of program structure in itself unobjectionable.

It does not help the Commission's view to argue as to the reasons for which it believes such proscription justifiable. The statute does not stop at prohibiting unjustifiable censorship. Apt here is the statement in Mr. Justice Frankfurter's dissent in *Winters* v. *People of New York,* U. S. , , 68 S. Ct. 665, 676, "Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons."

It is for this reason that the Commission's action can not be justified by the claim that what the Commission is seeking is a "program schedule properly balanced[1] . . ." (R., p. 140).

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[1] The following is from the diary of Dr. Joseph Goebbels for May 22, 1943:

> "I had a sharp conflict with Cerff about the present program of our broadcasting system. Cerff takes a somewhat super-national-socialistic attitude. If he had his way music, for instance, would be made only on lyres. You can't operate a radio service for the masses that way. Broadcasts must have diversified and manifold programs . . ."

The Goebbels Diaries, Doubleday & Company, Inc., Garden City, 1948, p. 390.

Any attempt by the Commission to satisfy its own concept of a balanced program structure by advance prescription is censorship.

Equally unavailing is the plea by way of justification, that the petitioner had parted with control over his programs (R., p. 139). As was pointed out by Mr. Justice Miller below, the petitioner had not abandoned his control; he was proposing to exercise it (R., p. 165). The Commission required the petitioner to make a prediction as to his programs. He performed an act of free selection and predicted a program structure. He has no contract or other commitment requiring him to accept the programs of the Columbia Broadcasting System. Were such a contract to exist, it would come within the condemnation of the Commission's regulations approved by this Court in *National Broadcasting Company* v. *United States* (1943), *supra.*

2) Even without Section 326, the Commission, under the First Amendment, may not set up a textual evaluation of radio programs as a condition precedent to the consideration of applications for licenses.

It would no doubt be conceded that if the Commission, instead of proscribing the full schedule of the Columbia Broadcasting System, had proscribed a particular social, political, economic, religious or "public affairs" point of view, the action of the Commission would have transgressed the protection of free press and free speech accorded by the First Amendment.[2]

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[2] The following is from *The American Radio, A Report on the Broadcasting Industry in the United States from The Commission on Freedom of the Press,* University of Chicago Press 1947 page, ix:

> "8. We recommend that, in order to establish radio, television, and facsimile broadcasting clearly within the meaning of the term 'press' as protected by the First Amendment, the industry appeal to the courts any actual

But there is no reason—even though there may be an historical excuse—for drawing the distinction between public affairs broadcast and general broadcasts.

The radiobroadcasting industry is primarily an entertainment industry and it derives its support from commercial advertising.

In *Mutual Film Corporation* v. *Industrial Commission of Ohio* (1915), 236 U. S. 230, this Court held that motion pictures, like "the theatre, the circus and all other shows and spectacles" are not within the protection of constitutional provisions for freedom of speech. In *Valentine* v. *Chrestensen* (1942), 316 U. S. 52, it was held that advertising matter is similarly not protected.

Putting aside Section 326 of the Communications Act, it might be argued that by combining the doctrines of the *Mutual Film* case and the *Valentine* case, radio broadcasting can be eliminated from the protection of the First Amendment.

But the position of radio broadcasting as a technique of mass communication in the modern world is far too important for such treatment.

The evils of the use of the licensing power whenever it tends to operate as a means of textual control have been fully summarized in *Lovell* v. *City of Griffin* (1938), 303 U. S. 444 and *Grosjean* v. *American Press Company* (1936), 297 U. S. 233.

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cases of interference by government with freedom of expression *on public affairs* via radio, and that the F. C. C. co-operate in making such appeals possible" (italics supplied).

It is to be noted that the Commission's concern is only as regards the field of "public affairs". This is due to the feeling of the Commission, expressed also in the Commission's special report by Professor Zechariah Chafee, Jr., *Government and Mass Communications*, that advance program prescriptions and proscriptions in other fields do not involve the First Amendment, op. cit. pp. 196-197 and note.

The protection has only recently been extended, by a divided Court, to the public use of loud speakers, *Saia* v. *People of the State of New York* (decided June 7, 1948), U. S. , 68 S. Ct. 1148.

And in *Winters* v. *People of the State of New York, supra,* the Court said (at p. 667 of the S. Ct. edition), "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

If there be anything in either the *Mutual Film Company* case or the *Valentine* case which could operate to deprive radiobroadcasting stations of the protection of the First Amendment, the cases should, to that extent, be overruled or distinguished.

In *Federal Communications Commission* v. *Sanders Brothers Radio Station* (1940), 309 U. S. 470, 475, it was said, "The Commission is given no supervisory control of the programs, of business management or of policy".

This rule was not set aside in *National Broadcasting Company* v. *United States, supra.* In that case the Court was dealing with the validity of regulations of the Commission prohibiting the exaction by the network of firm contracts by which stations were required to broadcast network programs.

3) The Commission's consistent recent course of conduct in the field of advance textual program proscriptions makes the question of its statutory power so to do a question of general importance which has not been, but should be settled by this Court.

a) Reference has already been made, *supra,* p. 4, to the publication by the Commission on March 7, 1946, of a text-book entitled "Public Service Responsibility of Broad-

cast Licensees", giving the Commission's detailed evaluation, for licensing purposes, of various types, proportions and balances of programs and announcing licensing policies concerning them. This book is described in the literature as "The Bluebook", owing to the color of its cover.

b) Section 3.788(a) of the Rules and Regulations of the Commission provides, "A licensee of an international broadcast station shall render only an international broadcast service which will reflect the culture of this country and which will promote international goodwill, understanding and cooperation". On July 14, 1939, the Commission "suspended the operation" of this section, but it has not been repealed.

c) In *Application of Mayflower Broadcasting Corporation* (1940), 8 F. C. C. 333, 339-341, the Commission ruled that a radiobroadcasting station may not broadcast editorially the views of its owners. Recently the Commission held extensive public hearings to determine whether, and how, this rule should be modified.

d) In *In re United Broadcasting Company* (1945), 10 F. C. C. 515, the Commission held that a licensee may not enforce a policy of excluding paid broadcasts on controversial matters and of restricting such broadcasts to "free" time.

e) In *In re Petition of Robert Harold Scott* (1946), 3 Pike and Fischer, Radio Regulations,[3] p. 259, the Commission held that stations must make time available for temperate arguments in support of the atheistic point of view.

f) In *In re Petition of Homer P. Rainey* (1947), 3 R. R. 737, the Commission held that notwithstanding Section 315 of the Act disclaims any obligation on any station to permit political broadcasting, the Commission would not permit a station to adopt a rule of practice limiting the amount

[3] Hereafter cited as "R. R."

of time allocated each candidate in a primary election to the times and extent involved in that instance.

g) In *Application of Capital Broadcasting Company* (1947), 4 R. R. 21, the Commission held that it is no bar to the renewal of a license that the station broadcasts horse-race results, provided that the information is not so detailed as to be "of particular interest to those who wager on the races" or so urgent as to interrupt other programs.

h) In *Application of Port Huron Broadcasting Company* (1948), 4 R. R. 1, the Commission held that a licensee may not edit or reject a political address because it contains libelous matter.

4) The refusal of the Commission to give the two competing applications comparative consideration and the action of the Court below in dismissing the petitioner's appeal combine to deprive the petitioner of the fair hearing to which he was entitled under the doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327 and nullify the provisions of Section 402(b)(2) of the Act according an appeal from a grant to another.

The Commission had before it the simultaneous and mutually-exclusive applications of the petitioner and of WGAR Broadcasting Company, each requesting the same facility. It designated both applications for hearing, "to determine on a comparative basis which, if either, of the applications in this consolidated proceeding should be granted" (R., pp. 12, 14). These orders were entered February 1, 1946, as required by the ruling in the *Ashbacker* case, *supra*, which had been handed down by this Court on December 3, 1945. A complete, comparative hearing was held. On October 8, 1946, the Commission handed down a proposed decision which discussed the two applicants upon a comparative basis (R., pp. 82 ff.). The extent of the comparison is shown by the following factors

which were considered and discussed as among the grounds for the proposed decision:

> —local residence, as favoring the petitioner (R., p. 97).
>
> —the overlap of the proposed service of WGAR with that of another station, under common ownership, this also favoring the petitioner (R., p. 97).
>
> —the preoccupation of the petitioner's programs with those of network origin to the exclusion of locally-originated programs (R., pp. 97-98).

However, this proposed decision was not adhered to. The final decision, published June 10, 1947, is entirely different in treatment (R., pp. 120 ff.). The final decision holds that the petitioner's program-structure predictions entirely disqualify his application from consideration. The application was accordingly denied without any comparison with that of WGAR Broadcasting Company. And the application of WGAR Broadcasting Company was granted without any comparison with that of the petitioner. The effect of this type of procedure is to make the WGAR grant an *ex parte* one so far as concerns the petitioner, but to deny the application of the petitioner on entirely separate consideration of only that portion of the record made by him. Otherwise put, the Commission by calling for a comparative hearing and then ignoring it in the decision, accomplished the very thing this Court had condemned in the *Ashbacker* case. By merely changing the sequence of events, it still undertook to grant the competing application *ex parte* and to accord the petitioner a nominal hearing.

Conceivably a case might arise wherein one of competing applicants might be disqualified under Section 310(a) of the Act as an alien or a representative of a foreign government or under Section 311 as having been found guilty of an offense under the monopoly laws. Such disqualification would likely render comparative consideration

unnecessary. But such was not the case here. In this case the Commission found the petitioner's program structure objectionable. On that alone it disqualified the petitioner and deprived him of all comparative consideration of his application, making a mere formality of the comparative hearing which had taken place.

A hearing is no hearing if the record made is ignored in the decision. Rather the decision should be based upon consideration of record. cf. *Securities and Exchange Commission* v. *Chenery Corporation,* 317 U. S. 80, pp. 94 ff.

The evil was compounded by the Court's dismissal of the appeal under Section 402(b)(2) of the Act from the grant of the WGAR application. Since the petitioner's own application had been denied, the Court said, he was not aggrieved or adversely affected by the WGAR grant and had no standing to appeal (R., p. 164). Here again there is a rearrangement of the time sequence. If the Commission, as it was required to do, had given the two applications comparative, instead of sequential consideration, the petitioner would be in a position to test the legal validity of the WGAR grant. If he could demonstrate it to be invalid as in direct violation of the Commission's rule against multiple ownership (see R., pp. 31, 32, 37, 78, 108-112), he would then be entitled to a grant of his own application if it is a good, though imperfect application.

If the law be as expounded by the Commission and the Court, then a formula has been developed to avoid the implications of comparative hearing and a way has been found to get around the *Ashbacker* case:

1. Determine which of two competing applications you wish to grant,
2. After hearing, consider the two applications in order, taking up first that which you wish to deny,
3. Find an imperfection to sustain a denial,
4. Grant the remaining application without opinion.

F.

Conclusion.

Wherefore, your petitioner prays that a writ of certiorari be granted under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, and for such further relief as to this Court may seem proper.

Dated this 18th day of August, 1948.

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APPENDIX.

Communications Act of 1934:

Section 326:

Censorship; Indecent Language

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Section 402(b)(1):

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

Section 402(b)(2):

(b) An appeal may be taken in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

NOTICE.

To:

The Solicitor General of the United States,

The General Counsel of the Federal Communications Commission,

Messrs. Kirkland, Fleming, Green, Martin and Ellis, counsel for WGAR Broadcasting Company,

Please note that the foregoing was filed with the clerk of the Supreme Court of the United States on August 18, 1948.

Yours truly,

PAUL M. SEGAL

August 18, 1948

We have received copies this day.

for the Solicitor General

for the General Counsel, F.C.C.

for Kirkland, Fleming, Green, Martin and Ellis

August 18, 1948.

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805508—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 232

ALLEN T. SIMMONS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Communications Commission (R. 121–146) are not yet reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 162–165) is not yet reported.

JURISDICTION

The United States Court of Appeals on May 24, 1948, affirmed the decision of the Federal Communications Commission. The petition for a writ

of certiorari was filed on August 18, 1948. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 23, 1925 (now 28 U. S. C. 1254), and Section 402 (e) of the Communications Act of 1934.

QUESTION PRESENTED

Whether the Federal Communications Commission may deny a radio broadcasting license to an applicant who, by his program plans, proposes to surrender voluntarily to a national network organization the control over his day-to-day program selection which, as was established by this Court's decision in *National Broadcasting Company* v. *United States,* 319 U. S. 190, he may not surrender contractually.

STATUTE AND REGULATIONS INVOLVED

Certain sections of the Communications Act of 1934 (48 Stat. 1064) have been set out in the Petition and Appendix attached thereto. Sections 307 (a) and 309 (a) of the Act, and also Sections 3.104 and 3.105 of the Commission's Rules and Regulations (47 C. F. R. Cum. Supp. 1943, §§ 3.104, 3.105) are reprinted in the Appendix, *infra,* pp. 18–20.

STATEMENT

Petitioner Simmons is licensee of radio broadcasting station WADC at Akron, Ohio. He applied to the Commission for a change of frequency and increase of power. After a hearing his application was denied and the mutually exclusive

application of the WGAR Broadcasting Company was granted. Simmons' petition for rehearing was denied by the Commission. He appealed to the United States Court of Appeals for the District of Columbia, which on May 24, 1948, affirmed the Commission's denial of his application.

In 1942, petitioner Simmons and the WGAR Broadcasting Company, licensee of Station WGAR in Cleveland, had on file conflicting applications to operate on the frequency 1220 kilocycles with increased power. Both WGAR and WADC had been in operation for many years on other frequencies. On November 3, 1943, after a comparative hearing, the WGAR application was granted and Simmons' application denied (R. 121). Simmons then appealed to the United States Court of Appeals for the District of Columbia which upheld the denial of a license to Simmons. *Simmons* v. *Federal Communications Commission,* 79 App. D. C. 264, 145 F. 2d 578, decided November 13, 1944. This 1944 decision is not in issue in the present case.

The 1943 grant by the Commission to WGAR, on the frequency 1220 kc. with power of 5 kilowatts, was conditioned upon WGAR's filing an application, as soon as war-critical materials should become available, to improve its facilities so as to afford more satisfactory coverage to the city of Cleveland (R. 121). Thereafter, on August 23, 1945, WGAR filed an application to increase its

power from 5 kw. to 50 kw. (R. 122). On October 8, 1945, Simmons filed an application (R. 7) to operate on 1220 kc. with 50 kw. and proposed that should his application be granted WGAR be assigned the frequency of 1350 kc. with 5 kw. power previously used by Simmons. Because of the geographical proximity of the two stations, both could not operate on the same frequency without intolerable interference. Since the grant of one application precluded the grant of the other, the Commission on February 1, 1946, designated both applications for a consolidated hearing. (R. 11, 13.)

A consolidated hearing on the two applications was held before a Commission examiner on April 24, 25, and 26, 1946 (R. 121). On October 8, 1946, the Commission handed down a Proposed Decision proposing to grant the application of WGAR and to deny that of Simmons (R. 82–102). Exceptions to this proposed decision were filed by Simmons (R. 102–107), oral argument was held before the Commission, and on April 27, 1947, the Commission released its final decision (R. 121), denying the application of Simmons and granting that of WGAR (R. 145). Simmons filed an application for rehearing (R. 146) which was denied by a Memorandum Opinion and Order of the Commission of July 1, 1947 (R. 155).

The Commission in its decision concluded that Simmons' proposed program policy was such that, independently of the existence of the WGAR application, the public interest and convenience

would not be served by granting Simmons' application. At the same time, from an examination of the entire record in the case, the Commission concluded that a grant of WGAR's application would serve the public interest, convenience, and necessity, and accordingly granted it. The Commission based its denial of Simmons' application on a finding that, if the application were granted, WADC would broadcast without exception all programs, sustaining and commercial, of the Columbia Broadcasting System during the entire period of their availability from 8:00 AM to 11:00 PM. This finding was based on the testimony of petitioner's witnesses, and its accuracy is undisputed. Petitioner's director of promotion and publicity testified (R. 57–58): "We will carry a complete Columbia sustaining and commercial schedule." He was asked, "It will not be changed?" and answered, "That is correct." He also testified that he did not contemplate making any substitution for any Columbia program even when a specific program proved to be unpopular among its listeners. Petitioner's assistant manager testified, "We will cut no Columbia regardless of whether it is sustaining or commercial." (R. 42.)

The Commission said in its conclusions (R. 138):

> The application of WADC thus raises squarely the issue of whether the public interest, convenience and necessity would be served by a station which during by far

the largest and most important part of the broadcast day, "plugs" into the network line and, thereafter, acts as a mere relay station of program material piped in from outside the community. We are of the opinion that such a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee. * * * applicant's proposed program policy is not only tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, but is an abdication to an organization which makes no pretense to scheduling its programs with the particular needs and desires of any one service area in mind. A national network affiliation can be of great assistance to a particular station's service to its listeners as the source of a quantity of high calibre programs of general interest not otherwise available locally, to supplement, rather that to supersede, the locally originated programs of the station. It is not equipped, however, to take over the entire programming of any station; even the stations which are wholly owned by the national networks maintain extensive local program staffs which integrate the network's service

> into a daily program best calculated to serve local interests. And the same considerations of public policy which led us, in our Chain Broadcast Regulations, upheld by the Supreme Court in *National Broadcasting Company* v. *United States,* 319 U. S. 190, to make it impossible for a network to restrict the opportunity of one of its affiliates to substitute programs of local interest and derivation whenever the station determined that such programs would best serve the interests of its particular audience, lead us to conclude, here, that the voluntary adoption of a similar policy by a licensee cannot serve the public interest. In either case the local interests of the listening community are needlessly sacrificed. * * *

An appeal was taken on July 21, 1947, to the United States Court of Appeals for the District of Columbia. That court on May 24, 1948, in a decision by Justice Edgerton, with Justice Miller concurring in a separate opinion, affirmed the action of the Commission. The court quoted at length, with approval, from the Commission's conclusions, and held that "the cases the Commission cites fully supports its action. The policy to which appellant objects is the policy the Supreme Court upheld in the cited *National Boardcasting Company* case." (R. 164.) In disposing of the argument that the Commission's decision constituted an illegal act of censorship, upon which Simmons relied almost entirely, the court below said (R. 164):

> Appellant contends that the Commission's policy amounts to censorship, which the Communications Act forbids. 47 U. S. C. § 326, 48 Stat. 1091. Even if the *National Broadcasting Company* case had not foreclosed any such contention, censorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgment to the conditions that arise from time to time.

The court also held that since Simmons' application was properly denied because of the Commission's determination that a grant would, independent of any question of comparative consideration of the mutually exclusive application of WGAR, not be in the public interest, Simmons was not aggrieved or adversely affected by the granting of the WGAR application, and therefore had no standing to attack it, citing *Simmons* v. *Federal Communications Commission,* 79 App. D. C. 264, 145 F. 2d 578.

ARGUMENT

I

The principal burden of appellant's argument, both in the court below and on this petition, is that the action of the Commission in denying appellant's application because the Commission determined that its proposed program service policies would not serve the public interest, convenience and necessity, constitutes an act of censor-

ship in violation of Section 326 of the Communications Act of 1934, as amended, 47 U. S. C. 326, as well as an abridgment of free speech contrary to the First Amendment to the United States Constitution. But an examination of the actual decision of the Commission makes clear that the decision of the Commission, far from being censorship or an abridgement of free speech, is, in essence, merely an application of the policy which was also embodied in the Chain Broadcasting regulations of the Commission which were upheld by this Court in the case of *National Broadcasting Company* v. *Federal Communications Commission,* 319 U. S. 190, against similar charges of censorship and abridgement of free speech.

What the Commission held to be contrary to the public interest in this case, is clearly governed by the policy underlying Sections 3.104 and 3.105 of the Commission's Chain Broadcasting Rules, upheld by this Court in the Networks case, *supra* (319 U. S. 190). Section 3.104 forbids a licensee to option all of its time for network programs, and provides that with respect to the time which may be optioned, the time may not be subject to call on less than 56 days' notice; also, the option for such time may not be exclusive as against other network organizations. Section 3.105 prohibits any contractual provision in a network affiliation agreement which would in any way limit the right of a station licensee to object any network program it believes to be not in the public interest or to

substitute for any regularly scheduled network program a local program of its own which the licensee believes will better serve the public interest. In its Report on Chain Broadcasting (Commission Order No. 37, Docket 5060) issued May 1941, the Commission at p. 66 explained its reasons for promulgating these particular regulations in the following passage which was in most part quoted with approval by this Court in *National Broadcasting Company* v. *United States,* 319 U. S. 190, 205–206:

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.
>
> We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.

> Even after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance.

Here petitioner proposes to do unilaterally and without consultation with the network, what he could not lawfully do by contract or arrangement with it. The obvious results of petitioner's adherence to its own policy are that his station becomes wholly unavailable for the carrying of local programs or the programs of other networks during all the hours of the day, from 8:00 a. m. onward (R. 42) when Columbia Broadcasting System is making its programs available. Petitioner himself admits, with respect to his voluntarily assumed policy, that "Were such a contract to exist, it would come within the condemnation of the Commission's regulations approved by this Court in *National Broadcasting Company v. United States, supra.*" (Pet., p. 12.) But once this admission is made, petitioner's entire argument falls. For operation which is contrary to the public interest is no less so because the licensee determines to engage in such an operation on his own volition rather than in accordance with a contract requiring him to operate in such a manner. And it is obviously no more censorship or an abridgment of free speech to prohibit licensees from voluntarily delegating the entire responsibility for the daily operation of

their station to parties other than the licensee and not under their immediate control or supervision, than to prohibit licensees from entering into contracts or agreements to do the same thing.

What petitioner fails to realize is that the Chain Broadcasting Rules, Sections 3.104 and 3.105 in particular, are necessarily based on the conclusion that the particular practices to which the licensee commits himself, rather than the mere fact that the licensee has made a contract with a network organization, result in operation contrary to the public interest. Clearly, the Commission cannot lawfully prohibit all contractual arrangements between licensees and network organizations; the licensee's contractual arrangements with a network organization or any other person or group can be lawfully prohibited by the Commission only insofar as the result of a specific contractual provision is to prevent or hinder operation by the station licensee in the public interest. Thus the basis for the Commission's proscription of the practices outlawed by Sections 3.104 and 3.105 rests in the adverse effect such practices have upon the licensee's ability to tailor its broadcast service to the particular needs of the community which it serves. As this Court has pointed out in *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 475, "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best prac-

ticable service to the community reached by his broadcasts." See also *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 138, footnote 2. The Act contemplates that such local and regional needs will be provided for through the day-to-day and program-to-program determination by the licensee or persons directly under his supervision and control, as to what available programs, without regard to source, will best serve the interests of the station's listeners. And where the licensee, either by contractual arrangement or of his own volition, ceases to assume this responsibility, it necessarily ceases to operate in the public interest.

It is not sufficient to argue, as petitioner argues here and in the court below, that the policy determination of Simmons to broadcast any and all programs offered to him by the Columbia Broadcasting System is, in itself, the requisite exercise of the licensee's duty to determine the programs to be broadcast over its station. Even if the licensee knew in advance specific programs which were to be broadcast by the Columbia Broadcasting System during the three year license period, the licensee would nevertheless be abrogating its responsibility to serve the public interest by deciding, at the beginning of the license period, that it would broadcast all of these programs, without exception, and without consideration as to whether the particular needs or interests of its listening audience at any given time during the license pe-

riod might require the carrying of some other program of special local or regional interest. But in this case, as the record makes clear (R. 59), petitioner does not know the specific programs to be broadcast by the Columbia Broadcasting System. And it is not sufficient to say that because this is a "voluntary policy" of the licensee and he will therefore not be contractually bound to continue with the policy, that the Commission must consequently come to a determination that the licensee will exercise its statutory responsibility in the programming of its station. In passing upon applications for broadcast licenses, the Commission is necessarily obliged to rely on what the applicant says it will do and cannot legally base any determination upon the fact that the licensee at some indefinite time in the future might determine to abandon the policy upon which he predicates his application. Petitioner has not stated in this case that he thinks he will broadcast *most* of the Columbia Broadcasting System programs or that he thinks he will not *generally* substitute local programs. On the contrary, he has unequivocally stated that he will broadcast all Columbia Broadcasting System programs and that "We could think of no instances in which we would be interested in carrying a Cleveland program or an Akron program, or a Canton program." (R. 40, 43.)

Petitioner's contention that the action of the Commission constitutes censorship in violation of

Section 326 of the Communications Act as well as an abridgment of freedom of speech in violation of the First Amendment of the United States Constitution is clearly without merit. While it is of course true that radio is among the means of expression which are protected from abridgment by the government by the First Amendment of the Constitution (*United States* v. *Paramount Pictures,* 334 U. S. 131, 166), nothing in the Commission's decision can remotely be said to constitute censorship of any radio program material in contravention of Section 326 of the Communications Act or to abridge petitioner's freedom of speech. As the court below aptly stated, "censorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgment to the conditions that arise from time to time". There is clearly no previous restraint of any kind stated or implied in the Commission's decision, nor does the ruling of the Commission require petitioner or any other licensee to broadcast or refrain from broadcasting any of the programs or types of programs which might be offered to it by the Columbia Broadcasting System or any other programs, whatever their source.

It is obvious that these claims of censorship and abridgment of freedom of speech are identical in nature with the similar allegations which have been already considered and specifically rejected by this Court in its decision in *National Broadcasting Company* v. *United States, supra.* In that case this Court held (319 U. S. 190, 226–227):

The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

II

Petitioner alleges that the Commission did not give "comparative consideration" to his application and that of WGAR, and that he has thus been deprived of the fair hearing required by *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327. But it is clear enough that the *Ashbacker* case is not applicable to the facts presented in this case. Petitioner's application was heard with the mutually exclusive application of WGAR, and the applications were disposed of on the basis of the record made in that hearing. The *Ashbacker* case deals with the timing and nature of the hearing necessary for affording competing applicants a full and fair hearing. It does not deal with the question of what findings and what grounds of decision are a sufficient basis for denial of an application after such a hearing is afforded.

When, as in the present case, the record of the consolidated hearing supports a finding that the contemplated operation of one of the applicants would not be in the public interest, so that his application could not be granted even in the

absence of a competing application, it becomes impossible in any meaningful sense to base a decision on "comparison" between the two applicants. "No formal or direct comparison is necessary between an application which must be denied and one which may be granted. Relative consideration is meaningless unless there are two applications either of which, considered alone, might be granted." *Simmons* v. *Federal Communications Commissions,* 79 App. D. C. 264, 265; 145 F. 2d 578, 579. Thus, since petitioner's application must be denied regardless of the existence of a competing application, he is not entitled to comparative consideration of his application on the other elements of public interest, convenience and necessity.

CONCLUSION

The decision below is correct and no novel question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

BENEDICT P. COTTONE,
General Counsel,
MAX GOLDMAN,
Acting Assistant General Counsel,
RICHARD A. SOLOMON,
JOHN EDGERTON,
Counsel,
Federal Communications Commission.

SEPTEMBER 1948.

APPENDIX

COMMUNICATIONS ACT OF 1934

SEC. 307 (a): The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

SEC. 309 (a): If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS

SEC. 3.104: OPTION TIME.—No license shall be granted to a standard broadcast station which options [1] for network programs any time subject

[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station

to call on less than 56 days' notice, or more time than a total of three hours[2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105: RIGHT TO REJECT PROGRAMS.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any

---

and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 283.

ALLEN T. SIMMONS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, THE WGAR BROADCASTING COMPANY, *Respondents*.

In Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION TO DESIGNATE "THE WGAR BROADCASTING COMPANY" AS A PARTY RESPONDENT.

BRIEF FOR THE WGAR BROADCASTING COMPANY IN OPPOSITION.

LOUIS G. CALDWELL,
DONALD C. BEELAR,
PERCY H. RUSSELL, JR.,
914 National Press Bldg.,
Washington 4, D. C.,
Its Attorneys.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 232.

ALLEN T. SIMMONS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, THE WGAR BROADCASTING COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION TO DESIGNATE "THE WGAR BROADCASTING COMPANY" AS A PARTY RESPONDENT.

The WGAR Broadcasting Company, a corporation, moves that the heading of the above described petition for writ of certiorari be amended by the addition of "The WGAR Broadcasting Company" as a party respondent thereto and, in support thereof, states:

The above petition for writ of certiorari, in omitting to name "The WGAR Broadcasting Company" as a party to this proceeding, does not conform with the heading to the decision of the United States Court of Appeals for the District of Columbia for a review of which the above petition for writ of certiorari is filed (R. 162-165).

The WGAR Broadcasting Company is an interested party in this proceeding, having intervened and partici-

pated therein before the United States Court of Appeals for the District of Columbia pursuant to Section 402(d) of the Communications Act of 1934, as amended, and, by Section 402(e) of said Act, is an interested party to the review of such decision by the Supreme Court of the United States upon petition for writ of certiorari under Section 240 of the Judicial Code, as amended, in that the objective of such petition for writ of certiorari is to reverse the decision of the Court below which dismissed petitioner's appeal from the Federal Communications Commission's grant of the WGAR Broadcasting Company's application for increase in power, and which affirmed the Federal Communications Commission's decision denying petitioner's application for the assignment to him of the radio frequency previously licensed to The WGAR Broadcasting Company.

WHEREFORE, The WGAR Broadcasting Company respectfully requests that it be designated as a party respondent in this proceeding, and be granted leave to file a brief in opposition to the above-described petition and such other relief as may be proper.

THE WGAR BROADCASTING COMPANY,

By .....
LOUIS G. CALDWELL

.....
DONALD C. BEELAR

.....
PERCY H. RUSSELL, JR.
914 National Press Building
Washington 4, D. C.
Its Attorneys.

Subject to the granting of the above motion, The WGAR Broadcasting Company herewith submits for consideration its brief in opposition to the above described petition for writ of certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 232.

ALLEN T. SIMMONS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, THE WGAR BROADCASTING COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE WGAR BROADCASTING COMPANY IN OPPOSITION.

OPINIONS BELOW.

The decision of the Court below (R. 162-165) dated May 24, 1948 is not yet reported. The decision of the Federal Communications Commission entered April 25, 1947 (R. 120-146) and its opinion and order entered June 28, 1948 denying petition for rehearing (R. 155-160) are not yet reported.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended, and under Section 402 (e) of the Communications Act of 1934, as amended.

QUESTION PRESENTED.

Whether the Commission may deny an application for a radio broadcasting station license to an applicant who is requesting the assignment to himself of a radio frequency which is presently licensed to an existing radio broadcasting station, which would have to be displaced from its assignment if such application were granted, where the applicant's affirmative showing on the public service features made in support of such application is merely that, if granted the authorization, he proposes voluntarily to broadcast exclusively 100% of the network programs originated by one national network organization to the exclusion of any local program service after 8:00 A.M. of each broadcast day and night.

SUMMARY STATEMENT.

Petitioner now is and for a number of years has been licensee of radio station WADC at Akron, Ohio, operating on 1350 kc and his status as such licensee is no way involved in the issues of this proceeding. At the time Petitioner filed his instant application with the Federal Communications Commission (herein referred to as "Commission") on October 8, 1945, requesting a change in frequency assignment from 1350 kc to 1220 kc, the latter frequency 1220 kc was then licensed to and in regular use at Cleveland, Ohio by The WGAR Broadcasting Company (referred to herein as "WGAR") pursuant to an earlier decision of the Commission rendered November 3, 1943, 10 FCC 222.

The frequency 1220 kc first became available for assignment in the Cleveland area of the United States in 1941 following an Executive Agreement (Series 196) between the Republic of Mexico and the United States and several international conferences thereunder. At that time Cleveland, Ohio was the sixth largest city and the tenth metropolitan district of the United States but it had only four radio stations, one of which was limited to daytime opera-

tion. WGAR operated one of the three full-time stations but its frequency assignment and power limitation was such that its coverage was inadequate and its signal was sufficient to provide good reception to less than 50% of the greater Cleveland area. In February 1941 when the frequency 1220 kc became available, WGAR promptly filed its application therefor. Petitioner, then the licensee of station WADC at Akron, Ohio sometime later filed for this frequency, 1220 kc. The two applications of WGAR and of Petitioner, each requesting the original assignment of 1220 kc in substantially the same area, were consolidated for hearing. Both parties participated in such hearing before the Commission on June 22-25, 1942. This proceeding resulted in a grant of the WGAR application and a denial of Petitioner's application by the Commission's decision of November 3, 1943, 10 FCC 222, which decision was affirmed on appeal taken by Petitioner. *Simmons* v. *Federal Communications Commission,* 145 F. 2d 578. There is no question but what Petitioner had a full and fair hearing before the Commission in the original assignment of 1220 kc to WGAR.

The original license of this frequency granted to WGAR was subject to a condition "that applicant shall take whatever steps are necessary to improve the signal of WGAR over the Cleveland business district to comply with the Commission's rules and regulations when materials and equipment again become available for construction of broadcast facilities." When the freeze on such critical materials was modified, the Commission, on July 24, 1945, sent a letter to WGAR calling its attention to the above quoted condition in its license and directed it to take necessary steps to improve its signal in the Cleveland area. Following procedure logically indicated, WGAR on August 23, 1945 filed its application for increase in power on its present frequency assignment to 50 kw. One month and a half later, Petitioner on October 8, 1945, applied for the assignment to him of the frequency then licensed to WGAR,

which he had been denied in the original proceeding. The two applications were heard in a consolidated hearing held April 24-26, 1946 in which Petitioner had a full and fair hearing and he makes no contention that the findings of fact are not in accordance with and supported by the evidence presented. Petitioner's presentation before the Commission, before the Court below, and in the instant petition for a writ of certiorari is based on an erroneous assumption that WGAR's action in applying for an increase in power on its existing frequency assignment in compliance with the condition of its license, opened up the original proceeding *de novo*. Petitioner does not contend that he is legally aggrieved or adversely affected by the Commission's grant of an increase in power to WGAR on its presently licensed assignment. Petitioner's interest is not based on his status as an existing licensee. Petitioner's position in this proceeding is based solely on his status as an applicant for the assignment to himself of the radio frequency licensed to WGAR. There is no question as to the facts or as to the adequacy or correctness of the Commission's findings. The single question is one of law, i. e., whether the Commission may deny an application for the license of a radio frequency assigned to another and refuse even to consider taking away or compulsorily modifying the license of the existing station which is admittedly rendering meritorious service in the public interest, when such applicant has nothing better to offer than a bizarre program policy of broadcasting exclusively 100% of the network programs of one national network organization.

ARGUMENT.

A. Petitioner Failed to Sustain Required Burden of Proof.

Quite regardless of what radio program service petitioner proposed to broadcast or not to broadcast, he brought upon himself, by seeking to displace another radio broadcasting station from its existing radio frequency as-

signment, the burden of establishing affirmatively compelling reasons in the public interest for such drastic action. *Chicago Federation of Labor* v. *F. R. C.*, 41 F. 2d 422, 423; *Journal Co.* v. *F. R. C.*, 48 F. 2d 461, 463; *In Re U. S. Broadcasting Corp.*, 2 FCC 208, 236; *In re Peoria Broadcasting Company*, 1 FCC 167. See *Ashbacker Radio Corp.* v. *F. C. C.* 326 U. S. 327, 332. The above proposition is stated in the cited cases as follows:

> "It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest and necessity are the paramount considerations." *Chicago Federation of Labor* v. *F. R. C., supra.*
>
> "The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interest of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons. Chicago Fed. of Labor v. Fed. Radio Comm., 59 App. D. C. 333, 41 F. (2d) 422. Unless such a policy is maintained, the public will not receive the character of service which we are convinced the Radio Act was intended to insure. No station that has been operated in good faith should be subjected to a change of frequency or power or to a reduction of its normal and established service area, except for compelling reasons." *Journal Co.*, v. *F. R. C., supra.*

> "Although the law expressly negatives a vested right in any licensee to the use of any particular frequency as against the reasonable regulatory powers of the government, the Federal Radio Commission early in its administration enunciated the principle that true public interest requires that existing stations should not be deprived of broadcasting privileges unless sound reasons of public policy demand such action. The United States Court of Appeals for the District of Columbia in Chicago Federation of Labor v. Federal Radio Commission, 59 App. D. C. 333, approved this principle. We recognize also that the principle is predicated upon the proposition that the existing station is doing as good or better job than a new applicant can or will do." *In re U. S. Broadcasting Corp., supra.*

The reasoning in the above cases is supported inversely by the decision in *Ashbacker Radio Corp.* v. *F. C. C., supra,* in requiring two applicants for mutually exclusive facilities to be accorded opportunity for hearing prior to the grant of either application.

In this case Petitioner made no attempt to meet such burden of proof. Instead the case he presented before the Commission was based on a misconception that, if an existing licensee applies for an increase in power on its present assignment, the frequency reverts to "public domain" and is opened up for application to all comers on a competitive basis as in the case of an original assignment of a radio frequency not theretofore in use. Petitioner presented no evidence attempting to disprove that the service being rendered by WGAR is in the public interest. Petitioner did not except to the findings of fact by the Commission on the meritorious service being rendered by WGAR (R. 134-135). Petitioner failed to establish any facts or initiate any procedure warranting Commission action of displacing WGAR from its existing frequency assignment.

The point herein made is upheld in the concurring opinion of Mr. Justice Miller in the Court below (R. 164):

"I think the order refusing to grant a license to Simmons was properly entered by the Commission, but not for the reason assigned by it and approved by the court. Appellant's application could and should have been denied because it sought a license for a frequency already in use in the same area by the intervenor under an existing license, and no valid reason appeared for depriving the intervenor of that use."

The foregoing is a complete answer to Petitioner's fourth contention (pp. 16-18) with respect to comparative consideration. See *Simmons* v. *FCC, supra.*

B. The Commission's Decision Does Not Constitute Censorship or Abridgement of Petitioner's Freedom of Speech.

Since Petitioner did not meet or sustain the burden his application assumed of making out a case which would warrant his appropriation of the radio frequency assignment to WGAR, we believe that he has no standing to raise the above issue. On the facts of this case it is difficult to understand how Petitioner's right to freedom of speech is abridged by the Commission's denial of his application for WGAR's frequency. Insofar as the instant decision is concerned, Petitioner is left in status quo as the licensee of radio station WADC with freedom to choose what service he will or will not render. In presenting his case before the Commission, Petitioner by his own choice staked his success or failure on the startling policy of broadcasting exclusively 100% of the national network programs originated by one network organization. The Commission's findings of fact on this evidence are correct. The Commission's decision on these findings correctly concludes that, on the showing presented, a grant of Petitioner's application would not be in the public interest, even if he were the only applicant.

The Commission's decision holds that a radio station licensee must maintain himself free to choose or reject what programs he will or will not broadcast. Under the above

described program policy presented to the Commission, Petitioner denied to himself freedom to choose what programs he would accept or reject. His proposal involved a delegation of Petitioner's responsibilities to one national network organization. That is the essence of the Commission's decision. And that is the basis of its affirmance by the Court below. The basis of the Commission's decision therefore, instead of constituting censorship, actually affirms the essential freedom and responsibility of a licensee to determine for himself what programs he shall or shall not broadcast.

In *Voliva* v. *WCBD, Inc.*, 313 Ill. App. 177, 39 N. E. 685, 689, the plaintiff had a contract with the licensee to broadcast a certain program over WCBD. Because of controversial matter injected into the program, the licensee required the plaintiff to submit his program script to the station forty-eight hours in advance. Plaintiff brought suit to enjoin this action which was dismissed on appeal:

> "They (licensees) must necessarily be held responsible for all program service and may not delegate their ultimate responsibility for such to others."

In *McIntire* v. *Wm. Penn Broadcasting Company*, 151 F. 2d 597, 599, the Court on appeal affirmed the dismissal of a complaint brought by a religious organization against a radio station licensee for his cancellation of a contract for the broadcast over his station of programs by the religious organization. The Court, in its opinion, stated:

> "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC."

In *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, this Court, in its decision affirming the Chain Broadcasting Regulations of the Commission over various contentions

raised by National Broadcasting Co. and Columbia Broadcasting System, including the contention that these regulations abridge freedom of speech, adopted much of the language from the Commission's Report on Chain Broadcasting, excerpts from which, relevant to the policy question raised in this case, are as follows:

"'The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. (P. 199)

* * * * *

"'A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. (P. 203)

* * * * *

"'The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.'" (pp. 205-6)

In this case, Petitioner is placed in the anomalous position of having to admit (Petition, p. 12), by analogy of the *National Broadcasting Company case, supra,* that the Commission's action in denying him the right, if based on contract, to broadcast over his station 100% of the programs of one network, would not be censorship; whereas, denial of his application based upon a voluntary proposal (which, if his application were granted, would become a commitment to the Commission under the Commission's interpretation of its powers) to broadcast over his station 100% of the programs of one network, is censorship.

Whether the result is arrived at by contract with a network organization or by voluntary commitment to the Commission, the essential fact is that the licensee is not retaining unto himself the freedom to choose or reject what programs he shall broadcast.

The Commission, in its memorandum opinion on rehearing stated (R. 159):

> "It may be noted, for instance, that the Commission's decision in no way states what particular programs or types of programs WADC would have to put on the air before it could be considered to serve the public interest, nor is there a single word in the Commission's decision which would be taken as indicating a Commission prohibition on the broadcast of any particular program or type of program."

The above statement constitutes an administrative holding by the Commission that, in this case, it is not attempting to tell Petitioner what "programs or types of programs he may or may not broadcast". Petitioner's argument on that point therefore, however interesting it may be on the subject of censorship in general, misses the mark on the particular facts of this case. Accordingly no novel question of importance is presented by the instant petition.

CONCLUSION.

It is therefore respectfully submitted that the above petition for writ of certiorari should be denied.

Respectfully submitted,

THE WGAR BROADCASTING COMPANY,

By .....

LOUIS G. CALDWELL

.....

DONALD C. BEELAR

.....

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Its Attorneys.

Service of a copy of the foregoing motion and brief in opposition and receipt of a copy thereof is hereby acknowledged this ..... day of September, 1948.

Solicitor General

By .....

Federal Communications Commission

By .....

ALLEN T. SIMMONS

By .....